

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,582

686

MADGE VINSON,
surviving wife,
DONNA JUNE VINSON and AMBER RANEE VINSON,
surviving minor children,

Appellants,

v.

CHARLES EINBINDER,
Deputy Commissioner,
Bureau of Employees' Compensation
and
AETNA CASUALTY & SURETY COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED

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QUESTION PRESENTED

The question is whether in a claim for death benefits under the Workmen's Compensation Act, the Trial Court erred in not setting aside a compensation order by the deputy commissioner where the evidence showed that the deceased suffered a heart attack and died in the cab of a truck crane while in the course of his employment.

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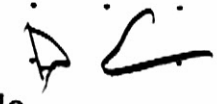
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an action by appellants for death benefits under the provisions of the workmen's compensation act applicable in the District of Columbia. The United States District Court for the District of Columbia took jurisdiction over this case pursuant to Title 11, Section 306 of the District of

Columbia Code (1950). This court has jurisdiction over this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is a case involving the death of Henry Vinson in the cab of a truck crane while employed as an oiler at a construction site in Washington, D. C.

On July 7, 1959, at approximately 10:00 a.m., Henry Vinson, husband and father of the appellants, was employed as an oiler for the McCloskey Enterprises, Inc., at the construction site of the newest House Office Building. On the date indicated, Mr. Vinson suffered a heart attack and died in the cab of a truck crane while in the course of his employment.

There was testimony at the hearing of this claim for compensation by Madge Vinson, wife of deceased, that her husband had complained to her that the job was too hard. (Tr. 8, J.A. 5) Mrs. Vinson further testified that Mr. Vinson said he thought the job was too much for him and that he didn't know how long he was going to be able to hold on to the job (Tr. 8, 10, J.A. 5, 6); that Mr. Vinson had been short of breath for a long time and complained of pain in his chest and that the weekend before his death, a trip was cancelled because of these complaints. (Tr. 6, 7, J.A. 4, 5).

Mr. Curtis testified he was the operator of the crane which was part of a rig driven by decedent (Tr. 21, J.A. 14); that he was an oiler for 10 to 15 years before he began to operate a crane (Tr. 45, J.A. 32); that he had driven such equipment for the past 20 years (Tr. 36, J.A. 23); that when moving the rig in question in a tight turn, the decedent was required to have the assistance of another employee to turn the steering wheel (Tr. 38, J.A. 25); that he had seen at least two employees on different occasions turn the steering wheel (Tr. 38, J.A. 25); that he had seen at least two employees on different occasions assist the decedent in turning the steering wheel of the rig; that the crane had a counterweight whose purpose it was to create balance when the crane was lifting heavy objects and that the

counterweight placed the greatest burden upon the rig operator when the counterweight lies close to the cab of the rig (Tr. 23, 24, J.A. 15, 16); that the decedent was backing the rig among rackers or steel beams about 17 feet apart (Tr. 33, J.A. 22); and that the counterweight at that time was over the cab of the rig because the area into which the rig was being backed up could not accommodate the counterweight. (Tr. 33, 34, J.A. 21, 22, 23).

There was further testimony from Mr. William C. Curtis that Mr. Vinson talked about getting an easier job because the rig was too much for a man his age. (Tr. 50, J.A. 32).

Mr. Donald Sinnar, the foreman on the job, testified that on other occasions he had helped Mr. Vinson turn the wheel on the truck crane at the job site; that on the day of Mr. Vinson's death, the decedent was required to maneuver and back the crane into a very tight and difficult spot (Tr. 77, J.A. 48); that on the morning of his death, Mr. Vinson had made three moves with the truck crane (Tr. 80, 81, J.A. 50); that the moves were very difficult and it was a hard maneuver; that many times he had reached up and helped Mr. Vinson pull the steering wheel around (Tr. 81, J.A. 50, 51); that on the morning of the decedent's death, Mr. Lemon helped him move the steering wheel. (Tr. 82, J.A. 51).

There was testimony that the truck crane in question did not have power steering which made this rig much harder to turn. (Tr. 60, 73, 74, J.A. 38, 46, 113).

Mr. George T. Diederick, Jr. testified that he had known Mr. Vinson for eight years prior to his death and that Mr. Vinson was never one to complain very much. (Tr. 120, 121, J.A. 72).

Mr. James L. Canody testified that he operated the truck crane that Mr. Vinson was driving on the day after Mr. Vinson's death. (Tr. 188, J.A. 113). He also testified that backing the rig between the rackers was quite a strain and that this particular rig was the hardest he had to operate. (Tr. 194, J.A. 117).

Dr. Clayton B. Ethridge testified that strenuous physical effort could well have precipitated the coronary insufficiency which caused Mr. Vinson's death. (Tr. 96, 102, J.A. 60, 66).

Dr. Bernard J. Walsh also testified that strenuous, unusual effort could have caused the coronary insufficiency. (Tr. 177, J.A. 108).

STATUTES INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 902(2):

Definitions

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 920:

Presumptions

(20) In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary —

(a) That the claim comes within the provisions of this Act

. . . .

STATEMENT OF POINTS

1. The Trial Court erred in failing to set aside the compensation order.

2. The Trial Court erred in granting defendants' (appellees') Motion for Summary Judgment.

SUMMARY OF ARGUMENT

This claim for compensation benefits by the widow and surviving minor children of Henry Vinson was scheduled for hearing before a deputy commissioner on the issue of death arising out of or in the course of employment.

The order denying this claim was based on findings of fact contrary to the testimony in the record.

There was testimony to the effect that on the day of his death, Mr. Vinson did have assistance from a co-worker in turning the steering wheel of the truck crane; that he complained to his wife that the job was difficult; that he discussed the possibility of changing jobs with a fellow worker; that the work he was performing at the time of his death was very strenuous and required heavy physical strain; that he complained to his wife about pains in his chest and shortness of breath.

There was uncontroverted testimony that Mr. Vinson suffered a heart attack and died while backing a non-power steering, 68,000 pound truck crane in the course of his employment. There was uncontroverted testimony that Mr. Vinson actually died in the cab of the truck while performing his duties as an oiler. There was uncontroverted testimony that on previous occasions, Mr. Vinson had help in steering the truck part of the rig and on the morning of his death, he had made three such difficult maneuvers. The absence of power steering made the job of backing the rig around the rakers a physically-taxing effort.

To deny a compensation claim under these circumstances would be to hold that the presumptions so liberally applied under the provisions of the Act have no meaning and are, in fact, completely contrary to the letter and spirit of the law.

The medical testimony given by the two heart specialists was in substance that strenuous activity could have caused Mr. Vinson's heart attack resulting in his death. Several witnesses on the job at the time of

Mr. Vinson's death testified that the work he was performing was very hard and strenuous.

The record, considered as a whole, does not support the deputy commissioner's finding that the death of appellant's husband and father did not arise out of and in the course of employment. Accordingly, this Court should reverse the Trial Court's refusal to set aside the compensation order.

ARGUMENT

I

BACKGROUND TO THE LAW

Under the Longshoremen & Harbor Workers' Act, made applicable to the District of Columbia (45 Stat. 600; 19 D.C. Code 11, 12; May 17, 1928), workmen's compensation is payable for "injury" defined as "accidental injury or death arising out of and in the course of employment."

The phrase "accidental injury" received the prompt attention of the Courts, and in Pacific Employers' Ins. Co. v. Pillsbury, 61 F.2d 101; Sept. 7, 1932, the Ninth Circuit Court of Appeals stated:

"The employer accepts the employee subject to physical disabilities, which may make the latter more susceptible to injury than would be a stronger or more robust person; and the former may suffer an accidental injury where his more fortunately constituted fellow workmen may suffer no injury at all."

In reaching this construction, the Court reviewed early decisions of the Courts of England, including the House of Lords.

The Pillsbury Case involved a stevedore who became ill after loading sacks of grain, complained of pain after returning from supper, and died two days later. The left lung was completely collapsed, filled with foul liquid suggesting a previously diseased condition, and there was medical testimony that "due to the diseased condition the collapsing of

the lung might have occurred at any time, regardless of any physical effort being made by the man. There was other medical testimony which attributed the heavy labor as the immediate cause of the collapse."

The insurance carrier in the Pillsbury Case argued that no accidental injury had occurred and that the pre-existing disease contributed to produce the bodily damage thereby making the Act inapplicable. In sustaining a compensation award, the Ninth Circuit Court of Appeals referred approvingly to the language of Lord Loreburn of the House of Lords (Clover, Clayton & Co. v. Hughes, L. R. Appeal Cases, 1910, Page 242):

"A workman, suffering from an aneurism in so advanced a state of disease, that it might have burst at any time, was tightening a nut with a spanner, when the strain, quite ordinary in this quite ordinary work, ruptured the aneurism and he died."

Lord Loreburn for the House of Lords found this to be "accidental" within the meaning of workmen's compensation, adding:

"I think it may also be something gone wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel. If that occurred when he was lifting a weight it would be properly described as an accident . . . I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary . . . or do I think we should attach any importance to the fact that this man's health was as described . . . An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health." (underlining supplied)

This view of the law is not alien to the U. S. Court of Appeals for the District of Columbia, which has stated:

"It has been held a number of times, and we think correctly, that an accidental injury may occur notwithstanding the injured is then engaged in his usual and ordinary work, and likewise that the injury need not be external. It is enough if something unexpectedly goes wrong within the human frame . . . In these circumstances, the thing that happened

was fortuitous and, since there is enough evidence to show that the event accelerated his death, even though it was not the single cause, the award by the Deputy Commissioner must be sustained." (Commercial Casualty Co. v. Hoage, 75 F. 2d 677; 1935)

The case just cited involved a grocery clerk who became ill after loading a number of sacks of potatoes weighing about 150 lbs. each. He was sent home, never returned to work, and died of heart disease twelve months later.

In a more recent case, a longshoreman died after using a pick to chop bulk salt and rolling a 500-lb. barrel of rosin. Upon autopsy, he was found to have had a pre-existing heart condition, hemorrhagic gastritis, acute dilation of the stomach, bilateral pulmonary edema, chronic cholecystitis, chronic appendicitis, and syphilis. The death was not instantaneous; rather, the employee slumped over, complained of being ill and having cramps in the stomach and hands. He died en route to the hospital. (Henderson v. Pate Stevedoring Co., 134 F. 2d 440; 1913).

The Deputy Commissioner found that the hard manual labor and the conditions of employment materially aggravated the deceased's heart condition and hastened his death. The District Court disagreed. On appeal to the Circuit Court of Appeals for the Fifth Circuit, the award of compensation was affirmed.

It is established law that legislation of a beneficent character shall be liberally construed and that the benefit of any doubt shall be resolved in favor of the claimant.

On the basis of such interpretation, the Fifth Circuit Court of Appeals found a causal relationship between employment and a coronary in a case where an employee was required to climb an almost perpendicular stairway of 12 - 15 steps to a ship's deck, then walk the gangway to the wharf where he picked up a load of paint. On his return, he felt a sharp pain in his chest, collapsed. This incident occurred on March 27, 1953. After hospitalization and medical care and after returning to light duty,

he again collapsed while walking to the union hall after working but a half day, and died. This occurred on December 2, 1953 . . . nine months later! Compensation was awarded and upheld. (Mississippi Shipping Co. v. Henderson, 231 F.2d 457; 1956).

In John W. McGrath Corp. v. Hughes, 264 F.2d 314; 2d Cir. 1959, a stevedore with a diabetic condition was taken off regular duty and assigned as a sweeper. The employer produced evidence that the employee was specifically instructed to do only sweeping and errands but not to go to the dock while work was being done there. The widow of the deceased, who died from a myocardial infarction, testified that her husband told her he had been pulling a lighter (a large boat or barge) with a line, after which he felt severe pain in his chest and arm and had to stop work and rest. He remained in bed over the weekend but reported for work on the following Monday. He collapsed soon thereafter and died three weeks later. Compensation was awarded and upheld.

The District of Columbia does not lag in the liberal interpretation of the law.

"It is the rule in this jurisdiction that if the injury occurs on the employer's premises during the employee's working hours, there is a presumption that the injury arose out of the employment, unless the contrary is shown." (Travelers Ins. Co. v. Cardillo, 78 U.S. App. D.C.)

and:

" . . . While the presumption is not evidence, nonetheless, it shifts the burden of going forward with the evidence. (Liberty Mutual Insurance Co. v. P. J. Donovan, 124 F. Supp. 322; 1954).

* * *

The leading cases in this jurisdiction support the compensability of the claim.

In Vendemia v. Christaldi, 221 F.2d 103; 1955, our Court of Appeals in an unanimous decision remanded to the Deputy Commissioner who had denied widow's benefits in a heart case whose facts were that the decedent

was "about 50 years of age and apparently enjoyed good health;" on the day of his death, "he suddenly and unexpectedly suffered a severe attack accompanied by pain in the chest" after lunch, which followed several hours of carrying iron bars up 40 steps from a basement to a second floor. After eating lunch, the employee complained of chest pain, took a drink of water, then another, went to the cab of a truck where he lay down and was later found dead.

The Court of Appeals said:

"We have held that the occurrence of an injury in the course of employment strengthens the presumption that it arises out of the employment, with doubts resolved in the claimant's favor. (Hartford Accident & Indemnity Co. v. Cardillo, 72 App. D.C. 52, 54, 112 F.2d 11, 13, certiorari denied, 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415. And we have also held that where death in the course of employment is due to an illness which has taken a sudden and unusual turn for the worse, not shown by substantial evidence to be unrelated to the employment, the statutory presumption makes the death compensable." Robinson v. Bradshaw, 92 U.S. App. D.C. 216, 206 F.2d 435, certiorari denied, 346 U.S. 899, 74 S.Ct. 226, 98 L.Ed. 400.

Because the reasoning of the Deputy Commissioner was not disclosed, the Court did not direct an award.

However, in Friend v. Britton, 220 F.2d 820; 1955, the Court of Appeals did direct an award of compensation where same had been denied by the Deputy Commissioner. In this case, the employee suffered an injury to his previously diseased abdominal aorta. He laid off, resumed light work and then at the recommendation of doctors, he discontinued work. While the employee was granted compensation benefits for the injury, his widow was denied such benefits upon his death on the ground that natural progression of his disease was the cause of his death and not the injury. The Court of Appeals disagreed, found aggravation which hastened death and repeated the view expressed in an earlier case, "To hasten death is to cause it." (Avigone Freres, Inc. v. Cardillo, 73 App. D.C. 149, 150, 117 F.2d 385, 386).

II

THE DEPUTY COMMISSIONER'S FINDINGS WERE
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Deputy Commissioner noted certain findings of fact which were clearly contrary to the evidence in the record.

1. The Deputy Commissioner found that the deceased (age 52) had "never complained about the work being too difficult."

The record discloses the testimony of his widow that the decedent complained

"all the time that the job was too hard because that was something that he hadn't been used to doing . . . which he said was awfully hard for him to do, and he often said he didn't know how long he was going to be able to hold on to the job . . ."
(Tr. 8)

" . . . on this last job he had he complained all the time because he said he thought it was too much for him."
(Tr. 10)

The Motion for Summary Judgment conceded this error in finding of fact (p. 9) but defended the error on the ground that decedent's boss and prior boss testified that decedent never complained, and that the widow's testimony was uncorroborated.

The bosses to whom the Motion refers are William C. Curtis, operator of the crane which was part of decedent's rig, Donald J. Sinnar, foreman, and George P. Diederick, Jr., who last supervised the decedent 7 - 8 years prior to his death!

The first two did in fact testify to the difficulty which the decedent was experiencing in operating the rig.

Mr. Curtis testified that he was the operator of the crane which was part of the rig driven by the decedent (Tr. 21); that he was an oiler for 10 or 15 years before he began to operate a crane (Tr. 45); that he had driven such equipment for the past 20 years (Tr. 36); that when moving the rig in

a "tight turn", the decedent required the assistance of another employee to turn the steering wheel (Tr. 38); and that he had seen at least two employees on different occasions assist the decedent in turning the steering wheel of the rig; that the crane had a counterweight whose purpose was to create balance when the crane was lifting heavy objects and that the counterweight places the greatest burden upon the rig operator when the counterweight lies close to it (Tr. 23, 24); that the decedent was backing the rig among "rackers" or steel beams about 17 feet apart (Tr. 33); and that the counterweight at that time was over the cab of the rig because the area into which the rig was being backed up could not accommodate the counterweight. (Tr. 33-34).

This witness further testified:

"THE DEPUTY COMMISSIONER: . . . Did Mr. Vinson (i.e., Decedent) ever complain to you about it being difficult to maneuver?

"THE WITNESS: Well, one time he was talking about getting an easier job because it was pretty hard to steer, especially in that particular position."

* * *

"Q. (Mr. Ashcraft) You suggested he get a lighter job, is that right?

"A. Yes, I did, because it was just too much for a man his age and it took a young man with a lot of muscle power to drive it.

"THE DEPUTY COMMISSIONER: What were the circumstances under which you made this suggestion?

"THE WITNESS: Well, watching him sweat and try to turn the rig around, trying to get it back in to places and stuff like that.

"THE DEPUTY COMMISSIONER: Did he complain to you?

"THE WITNESS: No, he never complained to me."

It is apparent from the findings of the Deputy Commissioner that the failure of the decedent to "complain"¹ was of great significance in

¹ It is questionable whether this witness understood precisely what the Deputy Commissioner meant in using this term inasmuch as the witness had already stated that decedent spoke of getting an easier job because the steering was difficult.

rejecting the claim. However, the evidence discloses that the decedent was not the type to complain on the job. (Tr. 120).

The testimony of Mr. Curtis was supported by that of Donald J. Sinnar, who was foreman for decedent's employer, and who testified that he had helped the decedent steer the rig on occasions.

"Q. How hard was it to turn this particular wheel on this crane?

"A. Well, at times we had to make sharp turns, and it was so hard one would have to get up and help him pull the wheel around to make it cut the turn." (Tr. 73).

* * *

"Q. Would you consider this particular type of work strenuous?

"A. That particular rig, yes, sir, very strenuous." (Tr. 74).

* * *

"THE DEPUTY COMMISSIONER: On July 7, 1959, was he working for you when he died?

"A. Yes, sir.

"Q. What was he doing for you?

"A. Well, we were maneuvering and backing it in to a very tight and difficult spot."

* * *

"He was backing the truck crane in to a difficult position and making a sharp turn at the same time and —

"Q. Did you see him do it?

* * *

"A. Yes, sir. I was standing, in other words, in this same locality, you might say, and this crane was coming back into position here — ." (Tr. 77)

* * *

"I was back here, motioning the rig to come back . . . And two or three of my men were up front here. And all of a sudden one of the fellows hollered up here — 'Hank has passed out.' So everything, the truck crane was rolling a little bit. One of my men, Charlie Lemons, jumped there and shut the ignition off inside the cab." (Tr. 79).

"THE DEPUTY COMMISSIONER: Do you know of your own knowledge whether or not Mr. Vinson had any difficulty in moving that steering wheel of the truck with the crane?

"A. Difficulty, you mean hard labor?

"Q. Moving it, yes.

"A. Yes, sir, very hard. A hard maneuver.

"Q. Yes, sir, I know of many times I reached up and actually helped him pull the wheel around." (Tr. 81).

* * *

"Q. Did you do that this morning of July 7, 1959? (Tr. 82).

"A. No, sir . . . Charles Lemon, helped him that morning."

* * *

Mr. Diederick stated that while Mr. Vinson did not complain to him (and it would indeed be odd if Mr. Vinson did complain because Mr. Diederick had not supervised Mr. Vinson for about 8 years prior to his death) that Mr. Vinson " . . . never was one to complain very much." (Tr. 121).

This testimony not only weakens the attempt to excuse the erroneous finding of fact but serves to corroborate the widow's testimony.

2. The Deputy Commissioner found "that on said day (day of death) he did not require the assistance of co-workers in turning the steering wheel" of the 68,000-lb. rig.

As previously noted, the record discloses that upon questioning by the Deputy Commissioner himself, Donald J. Sinnar, foreman for decedent's employer at the time of decedent's death, testified that another employee, Charles Lemons, "helped him (decedent) that morning." (Tr. 82) This testimony was repeated by the witness later. (Tr. 85-86)

3. The Deputy Commissioner found "that the employee was not subject to heavy physical strain during the period" (i.e., 7:30 a.m. until 9:00 - 10:00 a.m., approximate hour of decedent's death).

For compensability, the law requires only that the strain to which a decedent was subject be sufficient to contribute to his death. (Commercial Casualty Co. v. Hoage, supra).

But, even if it be necessary to establish an unusual strain, the facts of this case leave little question that such occurred.

Apart from the testimony of the widow that decedent had complained that his job was too hard for him; apart from the testimony of Mr. Curtis who worked directly with the decedent operating the crane which was part of the rig driven by the decedent; apart from the testimony of Mr. Sinnar who was decedent's foreman at the time of death — apart from all of this testimony of the difficulty the decedent experienced — there is the testimony of a young man, 24 years of age, who, on the day following the death, operated the very rig upon which Mr. Vinson died.

The testimony of this witness, James L. Canody, was to the effect that the rig was "quite hard" to steer (Tr. 189); that he, too, needed help in steering the rig (Tr. 189); that in backing up the rig among the breakers which decedent was doing at the time of his death "it is quite a strain" (Tr. 192); and that the rig in question was "the hardest of the rigs I have operated . . . this one was the hardest and I have operated several without power steering." (Tr. 194).

Opposing this line of testimony as to strain are the witnesses, G. P. Diederick, Jr., and Howard F. Massey. But both of these respondents' witnesses admitted that they had never operated this rig. (Tr. 123, 139).

In the absence of cogent testimony on the difficulty of operating the rig in issue, and to overcome this near fatal gap in their evidence, the respondent sought to introduce a film showing the operation of the rig. Claimant objected to the use of such moving pictures on the basis that they do not reflect the condition of the rig at the time it was being used by the deceased. (Tr. 149). In fact, respondent admitted that the film was not taken until September 1960 — 15 months after the death!

The film opened by showing how positions of the rig are changed; however, the rig in this part of the film was not the one being used by the decedent at the time of his death. (Tr. 151). When the actual rig was filmed, showing its approach forward to a ramp, the driver is seen steering with one hand — the other tucked under his chin. The driver making a sharp turn into the street was holding his left hand on the door. In backing up, the driver had one hand out the door.

The film did not show the counterweight next to the cab with the boom in an upward position . . . the situation obtaining at the time of decedent's death and which imposes a greater burden upon the rig operator trying to move the rig in sharp turns. When asked — in cross-examination — why no film was made of this position, the photographer answered: "Well, it wasn't specifically indicated that you wanted to see that." (Tr. 154). A later witness then testified that he did see the boom in raised position with the counterweight next to the cab.

The appellants submit that in view of the presumptions set forth in Section 20 of the Act, the claim for compensation should have been allowed. As stated by the Supreme Court in O'Leary v. Brown - Pacific - Maxon, Inc., 340 U.S. 504 (1951), the findings are to be accepted unless they are unsupported by substantial evidence on the record as a whole.

In the instant case, there was substantial evidence supporting the appellants' claim for compensation. The Courts have consistently held that the occurrence of an injury in the course of employment strengthens the presumption that it arises out of the employment, with doubts resolved in the claimant's favor. Hartford Accident & Indemnity Co. v. Cardillo, supra.

This statement of the law by this Court is consistent with the intent and purpose of workmen's compensation. The Act itself is a humanitarian one. A claim is presumed to come within the Act and in this case, the substantive evidence was certainly in favor of this being a compensable claim.

III

IF AN INJURY OCCURS ON THE EMPLOYER'S PREMISES DURING THE COURSE OF EMPLOYMENT, THERE IS A PRESUMPTION THE INJURY AROSE OUT OF THE EMPLOYMENT.

We have seen in Travelers Ins. Co. v. Cardillo, supra, and Hartford Accident & Indemnity Co. v. Cardillo, supra, both decided by this Court, that if the injury occurs on the employer's premises during the employee's working hours, there is a presumption that the injury arose out of the employment.

Mr. Vinson suffered a heart attack and died in the cab of a truck crane on his employer's premises during working hours. There was an overwhelming abundance of testimony that the work Mr. Vinson was performing at the time of his death was strenuous work.

A reading of the record discloses that on the very important questions of fact, the Deputy Commissioner did not resolve the doubts — if such there were — in favor of the claimant.

On the matter of decedent's complaints, the difficulty in operating the particular rig, on the need for assistance on the day of his death, on the strenuous character of the work being performed at the time of death — on each of these items evidence is in the record in claimant's favor. Yet, the Deputy Commissioner ruled against the claimant on each and every one of these points. Can it be said that the benefit of the doubt was granted to the claimant? See: Hartford Accident & Indemnity Co. v. Cardillo, supra.

The law of the Vendemia Case emphasizes that "where the death in the course of employment is due to an illness which has taken a sudden and unusual turn for the worst, not shown by substantial evidence to be unrelated to the employment, the statutory presumption makes the death compensable." (underlining supplied).

There can be no question that the decedent's heart disease took a sudden and unusual turn for the worse, instantaneous death!

What substantial evidence does the record contain to overcome the statutory presumption? The weight of the testimony is decidedly in the direction of supporting the claim. Evidence of strain permeates the entire record — and in fact militates towards relating the sudden death to strain.

It is particularly noteworthy that the Deputy Commissioner regards the fact that decedent was receiving no assistance at the time of his death as a crucial point negating strain. In view of the difficult maneuver in which the rig was engaged at the time of death, the absence of assistance would tend to prove, rather than disprove, the contention that the strain caused the death.

The law does not require that an employee be doing something unusual in order that a claim be compensable. As stated by our Circuit Court of Appeals, "It is enough if something unexpectedly goes wrong with the human frame . . . In these circumstances, the thing that happened was fortuitous and, since there is enough evidence to show that the event accelerated his death, even though it was not the single cause . . ." (Commercial Casualty Co. v. Hoage, supra).

The Deputy Commissioner deemed that the fact "that the employee at the time of his death was performing duties consistent with the normal part of his job" to be a significant factor. Claimant believes that in the face of the law, this represents error. The language of the Statute was designed to meet just such a fact situation as the one presented here. Under the provisions in the Longshoremen's Compensation Act, that claim is presumed to come within the Act in absence of substantial evidence to the contrary, proof that decedent had been employed as an oiler and that he met his death while working on his employer's premises requires a holding that his death is compensable. Marra Bros. v. Cardillo, 3rd Cir., 154 F. 2d 357 (1946).

Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty owing by society to an injured employee to secure him protection, and this the act seeks to accomplish through the means of insurance built up by premiums paid by employers. Where there is doubt, it should be resolved in favor of the injured employee or his dependent family. In the circumstances shown in the record here, we think petitioner established a case of accidental death arising out of the employment and compensable under the statute. To reach a different conclusion would be to indulge in subtlety at the expense of the plain purpose and intent of the law. (Fidelity & Casualty Co. of New York v. Burris, U.S. App. D.C., 59 F.2d 1044 (1932)). See also: New Amsterdam Casualty Co. v. Hoage, U.S. App. D.C., 62 F.2d 468 (1932).

CONCLUSION

The appellants recognize that findings of fact by the Deputy Commissioner may not be set aside if supported by the record as a whole. But this does not mean, nor can it, that the Deputy Commissioner may make a finding which is completely contrary to the evidence; for example, that the decedent never complained, when in fact the widow testified that he had on a number of occasions complained that the work was too difficult for him.

In addition, the evidence establishes that he received assistance from co-workers on several occasions when turning the wheel of the 68,000-lb., non-power steering rig during particularly severe turns; that a supervising employee had suggested the decedent accept other employment because the job was too difficult for him; that on the morning of decedent's death, he had been helped by another employee while operating the rig; that at the time of his death, decedent was engaged in a difficult maneuver of turning the steering wheel on the rig, without assistance — when he suddenly died from a coronary insufficiency. The Deputy Commissioner's finding that decedent had no assistance at the time of death would not appear to prove absence of strain — but rather that the strain

was so great without assistance that the man's heart simply could not take the strain and stopped altogether. One cardiologist testified that the death was work-connected; the other that it was probably work-connected if the decedent was under an unusual strain.

On the above facts, a compensable claim is established under the law.

The appellants respectfully request that the Compensation Order rejecting the claim be set aside and that the matter be remanded to the Deputy Commissioner for a Compensation Order consistent with the law and the facts as indicated hereinabove.

Respectfully submitted,

ASHCRAFT and GEREL

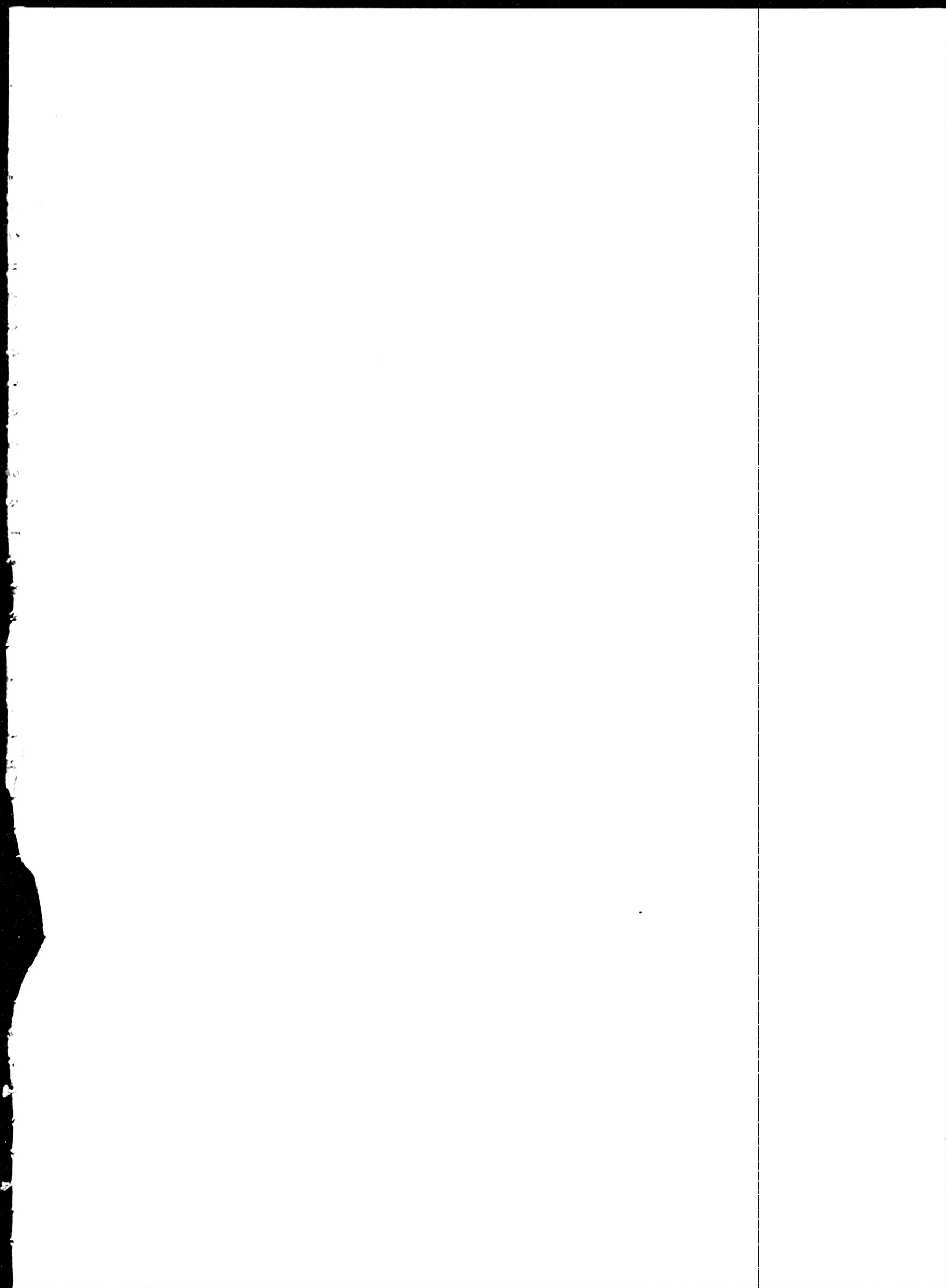
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BRIEF FOR APPELLEE EINBINDER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16582

**MADGE VINSON, SURVIVING WIFE, DONNA JUNE VINSON AND
AMBER RANEE VINSON, SURVIVING MINOR CHILDREN,
APPELLANTS**

v.

**CHARLES EINBINDER, DEPUTY COMMISSIONER, BUREAU OF
EMPLOYEES' COMPENSATION, AND AETNA CASUALTY & SURETY
CO., AND McCLOSKEY ENTERPRISES, INC., INTERVENORS,
APPELLEES**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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*United States Court of Appeals
For the
District of Columbia*

FILED NOV 7 1961

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CLERK

STATEMENT OF THE CASE

In the opinion of appellee Einbinder, the question presented is whether the record, considered as a whole, supports the deputy commissioner's finding that the death of the employee did not result from an injury which arose out of and in the course of his employment.

(1)

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United States Court of Appeals

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No. 16582

MADGE VINSON, SURVIVING WIFE, DONNA JUNE VINSON AND
AMBER RANEE VINSON, SURVIVING MINOR CHILDREN,
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v.

CHARLES EINBINDER, DEPUTY COMMISSIONER, BUREAU OF
EMPLOYEES' COMPENSATION, AND AETNA CASUALTY & SURETY
CO., AND McCLOSKEY ENTERPRISES, INC., INTERVENORS,
APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE EINBINDER

STATEMENT OF THE CASE

This cause arose upon a complaint to review and set aside as not in accordance with law a compensation order filed on December 14, 1960 by Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, in which order the deputy commissioner rejected the claim for compensation (death benefits) filed by appellants Madge Vinson, Donna June Vinson, and Amber Ranee Vinson (hereinafter also referred to as "plaintiffs" or "claimants"). The deputy commissioner rejected such claim for the reason that the death of Henry A. Vinson (hereinafter referred to as "deceased" or "employee") did not result from an injury which arose out of and in the course of his employment.

The said order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. Sec. 901 *et seq.*, as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501.

The court below, upon review of the record, granted the deputy commissioner's motion for summary judgment (as well as a similar motion filed by the intervening defendants below) and dismissed plaintiffs' action. This appeal followed.

THE COMPENSATION ORDER

The compensation order complained of reads in pertinent part as follows:

1. That on July 7, 1959, Henry A. Vinson, hereinafter referred to as "employee", was in the employ of the employer above named, whose address is 1620 Thompson Street, Philadelphia, Pennsylvania; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by The Aetna Casualty and Surety Company;

2. That the employment of the employee by the employer was as an oiler and truck driver at the employer's work project in the District of Columbia; that the employee's duties consisted of oiling, greasing, warming up, and driving a truck;

3. That on July 7, 1959, the employee, from 7:30 a.m. until sometime between 9:00 and 10:00 a.m. on said day, drove the truck with a crane attachment, weighing approximately 68,000 pounds, at the employer's work project, including backing up the truck in various positions, on three different occasions during the period, as found above; that on said day he did not require the assistance of co-workers in turning the steering wheel of the said truck; that he never com-

plained about the work being too difficult; that he never requested that he be taken off the job because it was arduous; that he never talked with his employer about getting another job; that he never complained to the employer of any difficulty with his chest or in his breathing as a result of the work he performed, as found above;

4. That sometime between 9:00 and 10:00 a.m., on July 7, 1959, the employee, while driving and backing the truck, as found above, into an area at the employer's work project, slumped over in the cab of the truck and died instantly; that the employee was not subject to heavy physical strain during the period, as found above; that the employee at the time of his death was performing duties consistent with the normal part of his job; that the cause of death of the employee was coronary insufficiency and coronary sclerosis;

5. That on August 12, 1959, the employee's widow, Mrs. Madge Vinson, filed claim in her own behalf and in behalf of Donna June Vinson and Amber Ranee Vinson, her minor children by the employee, against the employer for death benefits under the District of Columbia Workmen's Compensation Act alleging that the death of the employee arose out of and in the course of the employment by the employer; that the death of the employee was not caused by an injury arising out of and in the course of the employment; that the coronary insufficiency and coronary sclerosis which caused the employee's death, as found above, did not arise out of and in the course of the employment nor was it otherwise related thereto.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claims of Mrs. Madge Vinson, Donna June Vinson and Amber Ranee Vinson be and they are hereby Rejected for the following reasons:

That the death of the employee did not result from injury arising out of and in the course of the employment nor was it otherwise related thereto.

SUMMARY OF ARGUMENT

The evidence in the record considered as a whole supports the deputy commissioner's finding that the death of the employee was not caused by an "injury" arising out of and in the course of his employment.

The question whether the deceased's heart attack resulted from his employment or whether it was the normal end result of his underlying heart condition was a typical medical factual question. The deputy commissioner's finding in effect that there was no injury which arose out of the employment but that the death was from natural causes was supported by the testimony of a physician who was a medical expert on heart diseases. The witness gave a rational basis for his opinion.

Thus supported, the finding is not subject to judicial review according to all the authorities. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469; *Phoenix Assurance Company v. Britton*, — U.S. App. D.C. —, 289 F. 2d 784 (1961); *United States Fidelity & Guaranty Co. v. Britton*, 88 U.S. App. D.C. 293, 188 F. 2d 674 (1951).

ARGUMENT

I. The record considered as a whole supports the deputy commissioner's finding that the death was not causally related to the employment

(a) Applicable Principles of Compensation Law

Before referring to the record which, in our opinion, supports the finding complained of, it may be appropriate to invite attention to the following principles of workmen's compensation law which appear to be applicable to this case:

The burden is on the plaintiff to show that the evidence before the deputy commissioner does not support the compensation order complained of: *Mississippi Shipping Co. v. Henderson*, 231 F. 2d 457 (C.A. 5, 1956); *Lumber Mut. Cas. Ins. Co. v. O'Keeffe*, 117 F. Supp. 876 (E.D. N.Y. 1954); *Eastern S.S. Lines v. Monahan*, 26 F. Supp. 944 (D. Me. 1939), affirmed, 110 F. 2d 840; *Gulf Oil Corp. v. McManigal*, 49 F. Supp. 75 (W. Va. 1943).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage*, 63 App.

D.C. 169, 70 F. 2d 773 (1934); *Burley Welding Works, Inc. v. Lawson*, 141 F. 2d 964 (C.A. 5, 1944).

The findings of fact of the deputy commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole: *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Voris v. Eikel*, 346 U.S. 328 (1953); *United States Fidelity & Guaranty Co. v. Britton*, 88 U.S. App. D.C. 293, 188 F. 2d 674 (1951).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951).

The scope of judicial review in cases such as the one at bar is set forth in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), in which the Supreme Court said:

* * * The standard, therefore, is that discussed in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456. *It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.* * * *

* * * *We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion.* * * * [Emphasis supplied.]

Similarly with reference to the inferences drawn by a deputy commissioner, the Supreme Court in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), said:

In determining whether a particular injury arose out of and in the course of employment, the Deputy Com-

missioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But *the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the deputy commissioner is factually questionable.*

* * * *It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. [Emphasis supplied.]*

Under such interpretations of the Longshoremen's Act by the Supreme Court of the United States and the Court of Appeals for the District of Columbia (*Phoenix Assurance Company v. Britton*, — U.S. App. D.C. —, 289 F. 2d 784 (1961); *United States Fidelity & Guaranty Co. v. Britton*, 88 U.S. App. D.C. 293, 188 F. 2d 674 (1951); *General Accident Fire & Life Assurance Corporation v. Britton*, 103 U.S. App. D.C. 135, 255 F. 2d 544 (1958); *Liberty Mutual Insurance Co. v. Britton*, 100 U.S. App. D.C. 236, 243 F. 2d 659 (1957)), a court may not set aside a compensation order unless, on the whole record, the deputy commissioner was "compelled" to make findings, draw inferences and arrive at conclusions different from those set forth in the compensation order complained of.

(c) The Evidence

At the hearings before the deputy commissioner on September 8, October 17, and November 23, 1960, claimants presented evidence to the effect that Henry A. Vinson, sometime

between 9:00 and 10:00 on July 7, 1959, slumped over in the cab of a truck he had been driving at the employer's construction work site and died almost instantly, and that the death was caused by coronary insufficiency and coronary sclerosis. As hereinafter set forth, however, claimants failed to convince the deputy commissioner, by their lay and medical evidence, that the death of the employee was causally related to his employment, that is, that it "arose out of and in the course of the employment."

At such hearing witnesses testified in part and in effect as follows:

GEORGE P. DIEDERICK, Jr.: That he is part owner of the Capital Crane Corporation and operated a crane for 20 years; that he knew Henry A. Vinson, the deceased employee, who had worked as an oiler for him when the witness worked for the John McShain Company (Transcript, * page 115, Joint Appendix, page 69); that the witness was on the job site about two hours after the death of the employee; that the rig (which consisted of a crane on a truck, with the employee driving the truck only, T. 121, J.A. 72-73) had what is called a counterweight, the purpose of which is to balance the load picked up by the crane; that if the crane is leaning over the cab of the truck, the placement of the counterweight is in the opposite direction, behind the driver (T. 116, J.A. 70); that the placement of the counterweight, together with the angle of the boom of the crane can lessen the weight on the front of the rig by putting more weight to the back; that, as far as he knew, the rig had not been moved between the time the employee died and the time the witness saw the rig; that he saw the position of the boom on the rig (T. 117, J.A. 70); that the boom was at a 45 to 60 degree angle over the back end (witness demonstrating angle of boom on Joint Exhibit No. 3 received in evidence by reference) (T. 118, 119, 126, J.A. 70-71, 75); that this angle of the boom would have no effect on the steering of the rig, rigs being moved on streets with the boom in such position (T. 118, J.A. 71); *that the rig drives more or less like a big truck, and does not require any*

* Transcript refers to the typewritten transcript of the hearing before the deputy commissioner.

extraordinary strength to operate; that the roads at the job site where the rig was sitting and into which the crane could be backed for operation at the different sections of the construction were from 20 to 40 feet—"wide enough so you can travel all around and not have any trouble at all" (witness pointing out such roads on Joint Exhibit No. 3) (T. 119-120, J.A. 71); that the witness saw Mr. Vinson, whom he knew very well, driving the rig at the construction project a few days before his death and the employee never complained about the rig being hard to drive nor about having pains in his heart or chest (T. 120, 128-129, J.A. 72, 76-77); that when the witness came on the job site two hours after the employee's death he got a report that the boom had not been moved since that event (T. 125, J.A. 75); that on occasions he saw the employee driving the rig during the time he was on the job (commencing May 20, 1959, T. 165-166, J.A. 100) and the employee did not have any trouble driving such rig (T. 128, J.A. 77).

Howard F. Massey: That he is employed by the McCloskey Company as general superintendent and knew Mr. Vinson as one of the workmen (T. 135, J.A. 81); that after the death of the employee he learned the employee had been working as an oiler on an "American" crane numbered 151 (T. 135, 142, J.A. 81, 85); that when notified of the employee's death he came to the job site as they were moving the employee's body and observed that the rig was at an angle from a "road", the front of the crane facing the southwest and the rear facing northeast; that Joint Exhibit No. 3 does not represent the scene where he found the crane upon his arrival at the job site, the crane being on the other side of the building on a different project altogether; that there were only a very few "whalers" (temporary retaining wall, T. 136, J.A. 82) at such site and they were not as extensive as shown in Joint Exhibit No. 3 (T. 136, J.A. 82); that the boom was over the back of the crane and the counterweight was up against the cab; that the crane had not been moved and the rig was in the position it had stopped upon the death of the employee; that since the death the same crane has been in use continually and not changed mechanically in any way

(T. 137, J.A. 82); that the rig (truck and crane) which Mr. Vinson was driving weighed 68,000 pounds (witness identifying crane numbered 151 as being shown in Joint Exhibits, Nos. 1 and 4) (T. 140, J.A. 84); that Mr. Vinson's foreman was Robert Davies (T. 141, J.A. 84-85); *that the truck (rig) Mr. Vinson had been driving was no more difficult to manage than any other manually steered truck*; that the witness has been in the construction business 35 years and is acquainted with this type of truck (rig) (T. 143, J.A. 85-86); that it is not possible for one crane (meaning rig) of the type steered by the employee to be harder to steer than another of the same type, and that all cranes steer the same provided they are greased properly (T. 144, J.A. 87); that the same exertion is required to turn the wheel on one as it is on another (T. 145, J.A. 87).

J. WRIGHT: That he has been engaged in commercial photography for 11 years and took motion pictures of a crane numbered 151 of the McCloskey Company (T. 146-147, J.A. 87-88); that this reel (received in evidence by reference as Respondent Exhibit "A" and projected at the hearings T. 149, J.A. 89) has not been edited in any way (T. 147-148, J.A. 88); that (testifying as the motion picture of the rig in operation was being projected at the hearing) the picture shows crane number 151 being driven out of the construction site to street level, with the driver making a sharp turn to go into the street and making another sharp turn (the deputy commissioner noting that the driver had his left hand on the door) (T. 153, J.A. 92); that the picture shows the rig being backed up on the street with the driver holding the door of the cab open (and therefore driving the truck with one hand) (T. 154, J.A. 92-93).

HOWARD F. MASSEY (recalled): That he saw the motion pictures of rig number 151 (the one previously used by deceased) projected at the hearing; that there had been no mechanical change in the rig between the date of the employee's death and the date the motion pictures were taken (T. 158, J.A. 95-96); that the driver of the truck, the oiler, was responsible for seeing that the rig is properly oiled and greased (such driver-oiler in the case of rig 151 having been the deceased

(T. 158-159, J.A. 96); that Mr. Davies (the immediate foreman of Mr. Vinson) is now deceased (T. 159, J.A. 96); that the motion pictures showed the rig traveling with the boom "in just about every position it is possible to get a boom to safely travel"; that in going up the ramp the boom was up quite steep, a 45 degree angle, and when the rig reached the street corner the boom was down for the purpose of getting it under overhead wires (T. 160, J.A. 97).

BERNARD J. WALSH, M.D.: That (as a specialist in cardiology) he examined the autopsy report, viewed the motion pictures of the operation of rig numbered 151, and read statements of various employees relative to the death of Mr. Vinson, and it was his conclusion as a result of study that *there was no relationship between the employee's work and his death* (T. 163, J.A. 98-99); that, according to the autopsy report, *the cause of death was acute coronary insufficiency*; that such a diagnosis is made by the exclusion of any other cause of sudden death of persons who are going about their usual activities of the day, such as sleeping or walking on the street (T. 164, J.A. 99-100); that it is impossible to relate death from such cause to what the person was doing unless it is shown that the person was doing something very strenuous or engaged in some unusual effort (T. 164-165, J.A. 99-100); that unless it is shown there was some unusual effort within a few minutes of death one cannot relate the two events (T. 165, J.A. 100); that from his viewing of the motion pictures showing the operation of rig number 151 he would not consider that any extraordinary exertion was required to drive it, particularly by a man whose daily work required such driving (T. 166, J.A. 100-101); that he bases his opinion on his viewing of the motion pictures together with the previous testimony in the record indicating Mr. Vinson was doing nothing unusual prior to his death (T. 166-167, J.A. 101); that, based on the autopsy report and record information, the employee apparently did have pre-existing heart deficiency in the form of narrowing of the coronary arteries (T. 177-178, J.A. 108); that Mr. Vinson had a pre-existing sclerotic heart disease; *that no effort was necessary to precipitate the employee's death from coronary insufficiency which was secondary to sclerosis*; that he did not

think that any emotional factors had created any stimuli which precipitated the employee's death (T. 178, J.A. 108); that there was "no relationship between [the employee's] work and his death" because the autopsy report showed no myocardial infarction, no fresh occlusion and no fresh thrombosis (T. 179-180, J.A. 109-110); that similar findings as here are made every day in autopsy reports in every large city with respect to persons who fall over dead while they are only walking down the street, sitting and talking or while in bed (T. 180-181, J.A. 110); that coronary insufficiency is characterized by pain in some cases but in others is characterized by sudden death "with no apparent symptoms beforehand"; that the employee's death was practically instantaneous (T. 181, J.A. 110); that coronary insufficiency, it is assumed, comes about when a fatal arrhythmia is triggered by narrowed coronary flow without the presence of any fresh or recent coronary thrombosis and without any myocardial infarction; that a diagnosis of coronary insufficiency is arrived at by the exclusion of all other possibilities in a person with coronary sclerosis (T. 182, J.A. 111).

While, as alleged in the complaint, the widow testified that the employee had complained to her about his job (paragraph 5, A, 1), there was an abundance of contrary evidence from co-workers, including the employee's boss and former boss (T. 23, 51, 58, 75-76, 83, 115, 120, J.A. 15, 33, 37, 47-48, 52, 69, 72). [Moreover, since the wife's testimony was not corroborated, it was not sufficient to establish the injury. See Section 23(a), 33 U.S.C. Sec. 923(a). And furthermore the deputy commissioner was not required to believe this self serving testimony of a party to the proceeding.]

Again, contrary to the allegation of the complaint (paragraph 5, A, 2) concerning assistance required by the employee on the day of his death to help him steer the rig, there was the evidence of the crane operator on the rig and the foreman that they did not see anybody help the deceased in that fashion on that day (T. 41, 70, 86, J.A. 26, 44, 53-54). [Moreover, in this connection, plaintiffs never called as a witness the person, Charles Lemons, who was alleged to have helped Mr. Vinson that day.] Finally, with respect to plaintiffs' allegation (paragraph 5, A, 3 of the complaint) of heavy physical strain exerted

by the employee on the morning of his death, there was likewise a clear conflict on this issue from fellow workers (T. 196-198, J.A. 118-119). Further the motion picture demonstrated the possibility of a certain ease of driving the rig, and Dr. Walsh, as noted above, pointed out in effect that the employee had been accustomed to doing this work daily.

(d) Discussion

The deputy commissioner's task in the instant case was to decide from the evidence in the record as a whole whether claimants had sustained their burden of proving that the death of the employee was employment related, namely, that death not only occurred in the course of employment but, in addition, that it arose out of that employment. Section 2(2) of the Longshoremen's Act, 33 U.S.C. Sec. 902(2).

It was solely within the province of the deputy commissioner, as the trier of the facts, to determine the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its truthfulness and reliability: *Kwasizur v. Cardillo*, 175 F. 2d 235 (C.A. 3, 1949), cert. denied, 338 U.S. 880; *Gooding v. Willard*, 209 F. 2d 913 (C.A. 2, 1954); *Associated General Contractors v. Cardillo*, 70 App. D.C. 303, 106 F. 2d 327 (1939); *Wilson & Co. v. Locke*, 50 F. 2d 81 (C.A. 2, 1931); *Hudnell v. O'Hearne*, 99 F. Supp. 954 (Md. 1951).

With respect to any conflict in the medical testimony offered by the parties, it is well established that a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F. 2d 76 (C.A. 4, 1958); *Baltimore & O. R. Co. v. Clark*, 56 F. 2d 212 (D. Md. 1932); *Jarka Corporation of Philadelphia v. Norton*, 56 F. 2d 287 (E.D. Pa. 1930); *Liberty Stevedoring Co. v. Cardillo*, 18 F. Supp. 729 (E.D. N.Y. 1937); *Zurich General Accident & Liability Ins. Co. Ltd. v. Marshall*, 42 F. 2d 1010 (W.D. Wash. 1930); *Ryan Stevedoring Co. v. Norton*, 50 F. Supp. 221 (Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall*, 57 F. Supp. 177 (W.D. Wash. 1944), aff'd 151 F. 2d 1007 (C.A. 9, 1945); *Contractors PNAB v. Pillsbury*, 150 F. 2d 310 (C.A. 9, 1945); *Crescent Wharf & Warehouse Co. v. Cyr*,

200 F. 2d 633 (C.A. 9, 1952); *Marine Operators v. Barnhouse*, 61 F. Supp. 572 (Ill. 1944).

It should be noted that judicial review of a rejection of a claim involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case there must be affirmative evidence in the record to support the award; in the former, affirmative evidence is not needed to support the denial of compensation since, upon failure of a claimant to carry the burden of proof in support of his claim, the claim must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. In other words, it is not necessary for the employer to prove a negative. *Gooding v. Willard*, 209 F. 2d 913 (C.A. 2, 1954); *Kwasizur v. Cardillo*, 175 F. 2d 235, *supra*. The rejection follows the claimants failure to establish his claim. In the *Gooding* case, the Court of Appeals said:

We might let decision turn on the above, but it should also be noted that *the burden to show that the accident was a contributing cause of the death was on the appellee*. It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, *the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged*. The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside. [Emphasis supplied.]

In view of the evidence presented in contradiction to the plaintiffs' claim that the employee's death not only arose in the course of but also out of the employment, as outlined

earlier herein, it would seem that the deputy commissioner's rejection of the claim was supported by substantial evidence in the record as a whole. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, *supra*.

With the production of evidence, the presumption (upon which appellants rely) found in Section 20(a) of the Act, 33 U.S.C. 920(a), that the claim "comes within the provisions of the Act" disappears and the issue is then decided upon the evidence without the presumption. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). The office of Section 20 is "to control the result *where there is an entire lack of competent evidence*." [Emphasis supplied.]

With respect to the other presumption invoked by appellants that an injury upon the industrial premises in the course of employment raises a presumption that the injury arose out of the employment, the difficulty with that contention is that the issue in the case is whether there was an "injury" a fact which plaintiffs assume in the premise of their syllogism.

There is no presumption in favor of compensability. *Hines v. Pacific Mills*, 214 S.C. 125, 51 S.E. 2d 383 (1940). The burden is on a claimant to prove the facts entitling him to an award of compensation, and this burden does not shift. Numerous cases to this effect are cited under Key Nos. 1339 and 1362, "Workmen's Compensation," American Digest System. *Indemnity Ins. Co. of North America v. Hoage*, 61 App. D.C. 173, 58 F. 2d 1074, 1075 (1932), reversed on other grounds, 288 U.S. 162. Referring to the presumption found in Section 20(a) of the Longshoremen's Act, 33 U.S.C. Sec. 920(a) that it shall be presumed "in the absence of substantial evidence to the contrary", that "the claim comes within the provisions of this Act", this Court stated:

This statutory presumption, however, furnishes merely a basis for proof and *not a substitute therefor*.

It does not shift the burden of proof from the claimant to *prove by substantial evidence that the injury arose out of and in the course of his employment.* [Emphasis supplied.]

While the courts have uniformly proclaimed that workmen's compensation laws must be liberally construed in favor of the injured employee and his dependents and have with the passage of time interpreted such laws with increasing liberality, such principle applies only to the construction of statutory provisions; in other words, it has no application to the probative effect of evidence. *Riley v. Henderson*, 218 F. 2d 752 (C.A. 5, 1955).

"The mere fact that the injury is contemporaneous or coincident with the employment is not a sufficient basis for an award." [Emphasis supplied.] *Speaks v. Hoage*, 64 App. D.C. 324, 78 F.2d 208 (1935). There, as in the present case, the deputy commissioner had rejected a claim that strain had contributed to the deceased employee's death from cardiac failure. There, also as in the present case, medical testimony was offered expressing doubt as to strain being a causative factor of death, the witness pointing out that persons with a heart condition of this type "will die in bed where they are under no exertion." The decision of the deputy commissioner was sustained, this Court stating:

In the present case we think that there is substantial evidence tending to prove that the death of the employee resulted from an acute attack of a long standing and fatal heart disease and that *the onset was not caused in whole or in part by any work performed by him.* [Emphasis supplied.]

CONCLUSION

In view of the above, it is respectfully submitted that the compensation order complained of is in accordance with law and that the judgment of the court below sustaining it was proper and should be affirmed.

DAVID C. ACHESON,
United States Attorney,

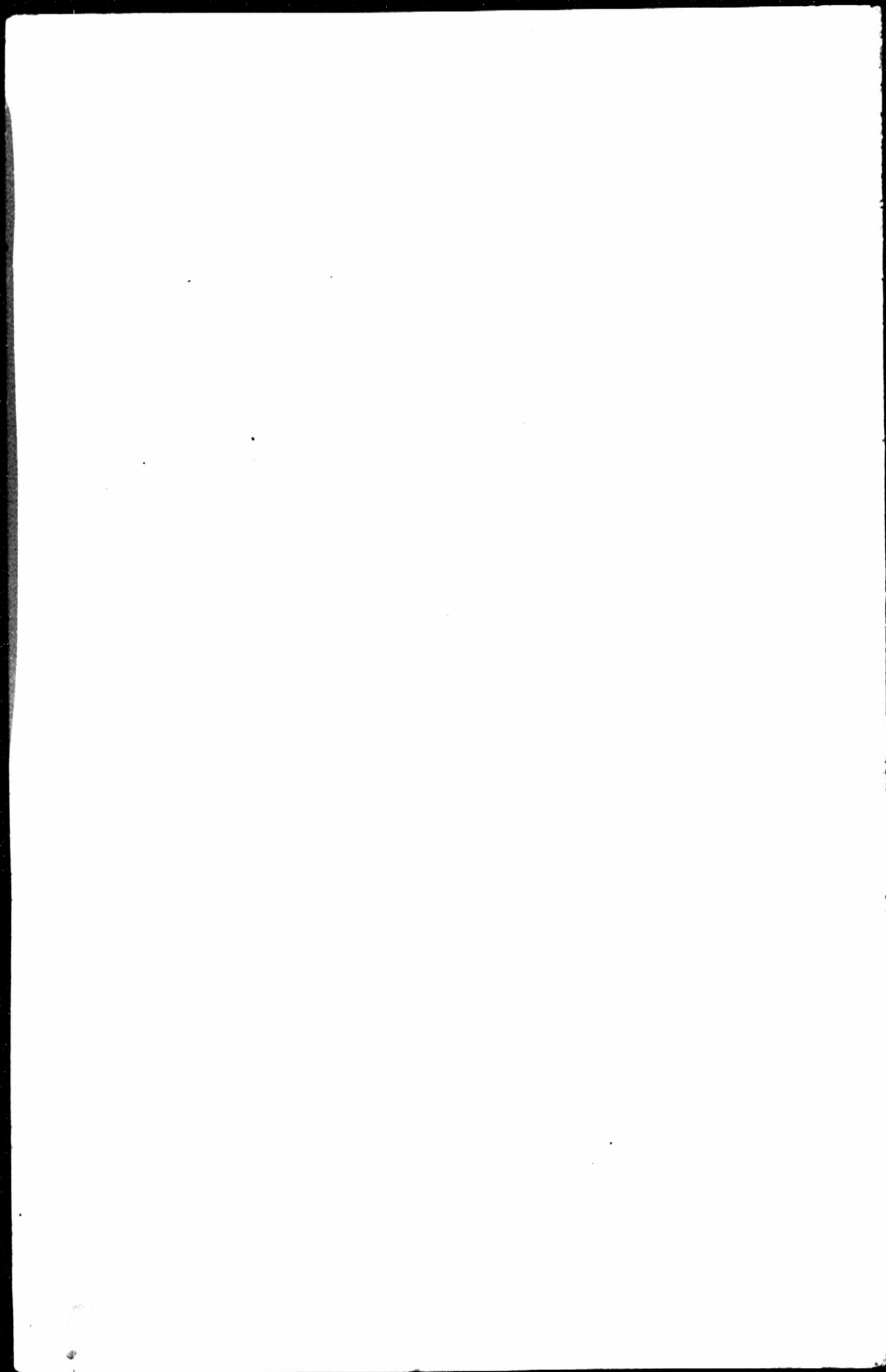
NATHAN J. PAULSON,
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Attorneys for Appellee Einbinder.

CHARLES DONAHUE,
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HERBERT P. MILLER,
Assistant Solicitor,

ALFRED H. MYERS,
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U.S. Department of Labor,
Of Counsel.



BRIEF FOR APPELLEES, AETNA CASUALTY &
SURETY CO. AND McCLOSKEY ENTERPRISES, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,582

MADGE VINSON,
surviving wife,
DONNA JUNE VINSON
and
AMBER RANEE VINSON,
surviving minor children,

Appellants,

v.

CHARLES EINBINDER,
Deputy Commissioner,
Bureau of Employees' Compensation
and
AETNA CASUALTY & SURETY CO.,
and
McCLOSKEY ENTERPRISES, INC.,
Intervenors,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 13 1961

Joseph W. Stewart
CLERK

M. S. MAZZUCHI

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Attorney for Appellees,
Aetna Casualty & Surety Co.
& McCloskey Enterprises, Inc.

(i)

QUESTION PRESENTED

The question presented is whether the trial court properly entered summary judgment on the factual findings of the Deputy Commissioner in view of appellants' failure to demonstrate that such factual findings were not supported by substantial evidence considering the record as a whole.

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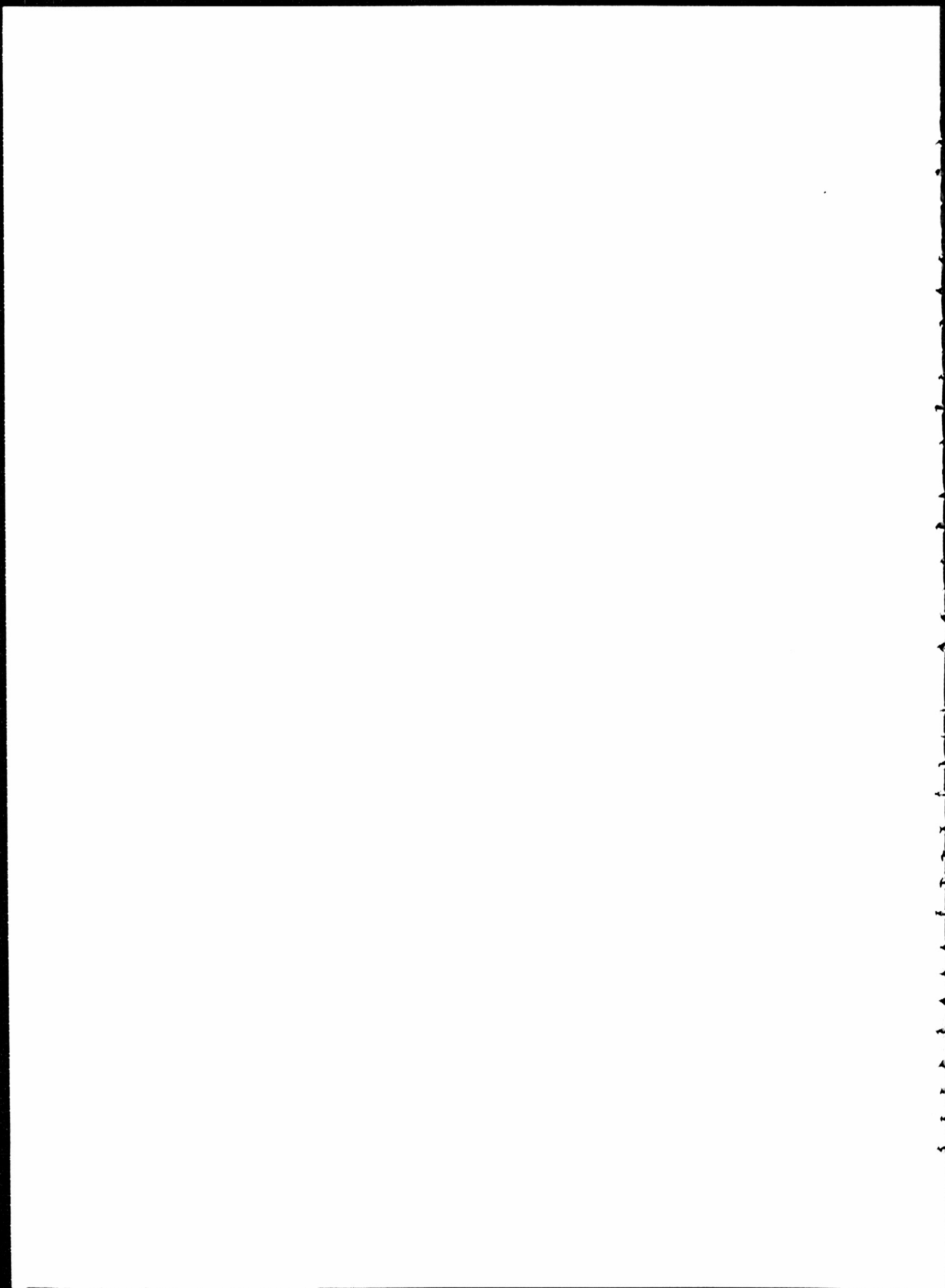
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UNITED STATES COURT OF APPEALS
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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR APPELLEES, AETNA CASUALTY &
SURETY CO. AND McCLOSKEY ENTERPRISES, INC.**

COUNTERSTATEMENT OF CASE

This appeal arises from an order of the United States District Court for the District of Columbia in which summary judgment is awarded to the employer, the compensation insurance carrier and the Deputy Commissioner as prevailing parties in a workmen's compensation proceeding in which the original order was entered on December 14, 1960. The workmen's compensation proceeding arose as the result of the filing of a claim for death benefits by the appellants, Madge Vinson, Donna June Vinson, and Amber Ranee Vinson (hereinafter also referred to as "plaintiffs" or "claimants"). The Deputy Commissioner rejected such claim for the reason that the death of Henry A. Vinson (hereinafter referred to as "deceased" or "employee") did not result from an injury which arose out of or in the course of his employment.

The said order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. Sec. 901 et seq., as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501.

The court below, upon review of the record, granted the Deputy Commissioner's motion for summary judgment (as well as a similar motion filed by the intervening defendants below) and dismissed plaintiffs' action. This appeal followed.

THE COMPENSATION ORDER

The compensation order complained of reads in pertinent part as follows:

1. That on July 7, 1959, Henry A. Vinson, hereinafter referred to as "employee", was in the employ of the employer above named, whose address is 1620 Thompson Street, Philadelphia, Pennsylvania; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by The Aetna Casualty and Surety Company;

2. That the employment of the employee by the employer was as an oiler and truck driver at the employer's work project in the District of Columbia; that the employee's duties consisted of oiling, greasing, warming up, and driving a truck;

3. That on July 7, 1959, the employee, from 7:30 a.m. until sometime between 9:00 and 10:00 a.m. on said day, drove the truck with a crane attachment, weighing approximately 68,000 pounds, at the employer's work project, including backing up the truck in various positions, on three different occasions during the period, as found above; that on said day he did not require the assistance of co-workers in turning the steering wheel of the said truck; that he never complained about the work being too difficult; that he never requested that he be taken off the job because it was arduous; that he never talked with his employer about getting another job; that he never complained to the employer of any difficulty with his chest or in his breathing as a result of the work he performed, as found above;

4. That sometime between 9:00 and 10:00 a.m., on July 7, 1959, the employee, while driving and backing the truck, as found above, into an area at the employer's work project; slumped over in the cab of the truck and died instantly; that the employee was not subject to heavy physical strain during the period, as found above; that the employee at the time of his death was performing duties consistent with the normal part of his job; that the cause of death of the employee was coronary insufficiency and coronary sclerosis;

5. That on August 12, 1959, the employee's widow, Mrs. Madge Vinson, filed claim in her own behalf and in behalf of Donna June Vinson and Amber Rane Vinson, her minor children by the employee, against the employer for death benefits under the District of Columbia Workmen's Compensation Act alleging that the death of the employee arose out of and in the course of employment by the employer; that the death of the employee was not caused by an injury arising out of and in the course of the employment; that the coronary insufficiency and coronary sclerosis which caused the employee's death, as found above, did not arise out of and in the course of the employment nor was it otherwise related thereto.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claims of Mrs. Madge Vinson, Donna June Vinson and Amber Rane Vinson be and they are hereby REJECTED for the following reason:

That the death of the employee did not result from injury arising out of and in the course of the employment nor was it otherwise related thereto.

SUMMARY OF ARGUMENT

The record considered as a whole supports the Deputy Commissioner's finding that the death of the employee was not caused by an injury arising out of or in the course of his employment.

The sole issues submitted to the Deputy Commissioner were issues of fact upon which he made his finding after hearing all of the evidence, medical and lay. His finding to the effect that there was no injury which arose out of or in the course of employment was supported by evidence in the record and hence is not subject to judicial review. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); United States Fidelity & Guaranty Co. v. Britton, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951).

ARGUMENT

I

The decisions of the Deputy Commissioner must be sustained unless clearly erroneous. His findings of fact are not subject to review by the appellate court if such findings are supported by substantial evidence considering the record as a whole. O'Leary v. Brown-Pacific Maxon, Inc., 340 U.S. 504 (1951).

In the instant case the Deputy Commissioner made a finding based upon substantial evidence that there was no employment-related injury. It is, therefore, incumbent upon the appellants to show that there is no evidence upon which this finding could be based. The burden is still upon the claimant or plaintiff to show that the evidence before the Deputy Commissioner does not support the compensation order complained of. The fact that the evidence could permit an inference other than the inference drawn by the Deputy Commissioner is not subject to review. The court does not re-weigh evidence. As the Supreme Court has said in the case of

Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947),

" . . . the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable.

" . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court."

A review of this record and the testimony adduced before the Deputy Commissioner did most certainly support the fact that there is testimony upon which the Deputy Commissioner's finding in the instant case should be supported.

The appellants lay great stress on the fact that legislation of a beneficent character such as workmen's compensation laws should be liberally construed and that the benefit of any doubt should be resolved in favor of the claimant. While the courts have uniformly stated that workmen's compensation laws must be liberally construed, such principles apply only to the construction of the statutes involved, but in no way do these principles have application regarding the probative effect of evidence. Riley v. Henderson, 218 F.2d 752 (C.A. 5, 1955).

The function of the Deputy Commissioner in a workmen's compensation case and in the instant case was to take testimony and decide from the evidence in the record, considering the record as a whole, whether the claimants had carried the burden of proof that the death of the employee was causally related to an employment incident. It is within the full province of the Deputy Commissioner to determine which witnesses he could believe or disbelieve in whole or in part in accordance with his

judgment. He is not bound to accept the opinions or theories of any witness. Associated General Contractors v. Cardillo, 70 App. D.C. 303, 106 F. 2d 327 (1939); Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F. 2d 76 (C.A. 4, 1958).

In view of the clear evidence contained in the record, as more particularly outlined in the brief of the appellee Einbinder, in direct contradiction to the plaintiffs' claims that the employee's death arose out of and in the course of employment, it would seem quite obvious that the Deputy Commissioner's rejection of this claim was supported by substantial evidence in the record as a whole.

The appellants appear to stress the importance of statutory presumptions in the instant case. We can only state what has been stated many times over by the courts that statutory presumptions furnish only a basis for proof. Statutory presumptions are overcome upon presentation of evidence at which time the issue is decided upon the evidence produced by both parties without consideration of the presumption.

The salient and unassailable feature of the Deputy Commissioner's findings in the instant case is that the claimant failed to prove that there was an injury to the deceased which arose out of and in the course of employment. It is the contention of this appellee that this finding is adequately supported by evidence in the record.

CONCLUSION

In view of the above, it is respectfully submitted that the compensation order complained of is in accordance with law and that the judgment of the court below sustaining it was proper and should be affirmed.

Respectfully submitted,

M. S. MAZZUCHI
405 Investment Building
Washington 5, D. C.
*Attorney for Appellees,
Aetna Casualty & Surety Co.
& McCloskey Enterprises, Inc.*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals
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Appellees.

FILED AUG 8 1962

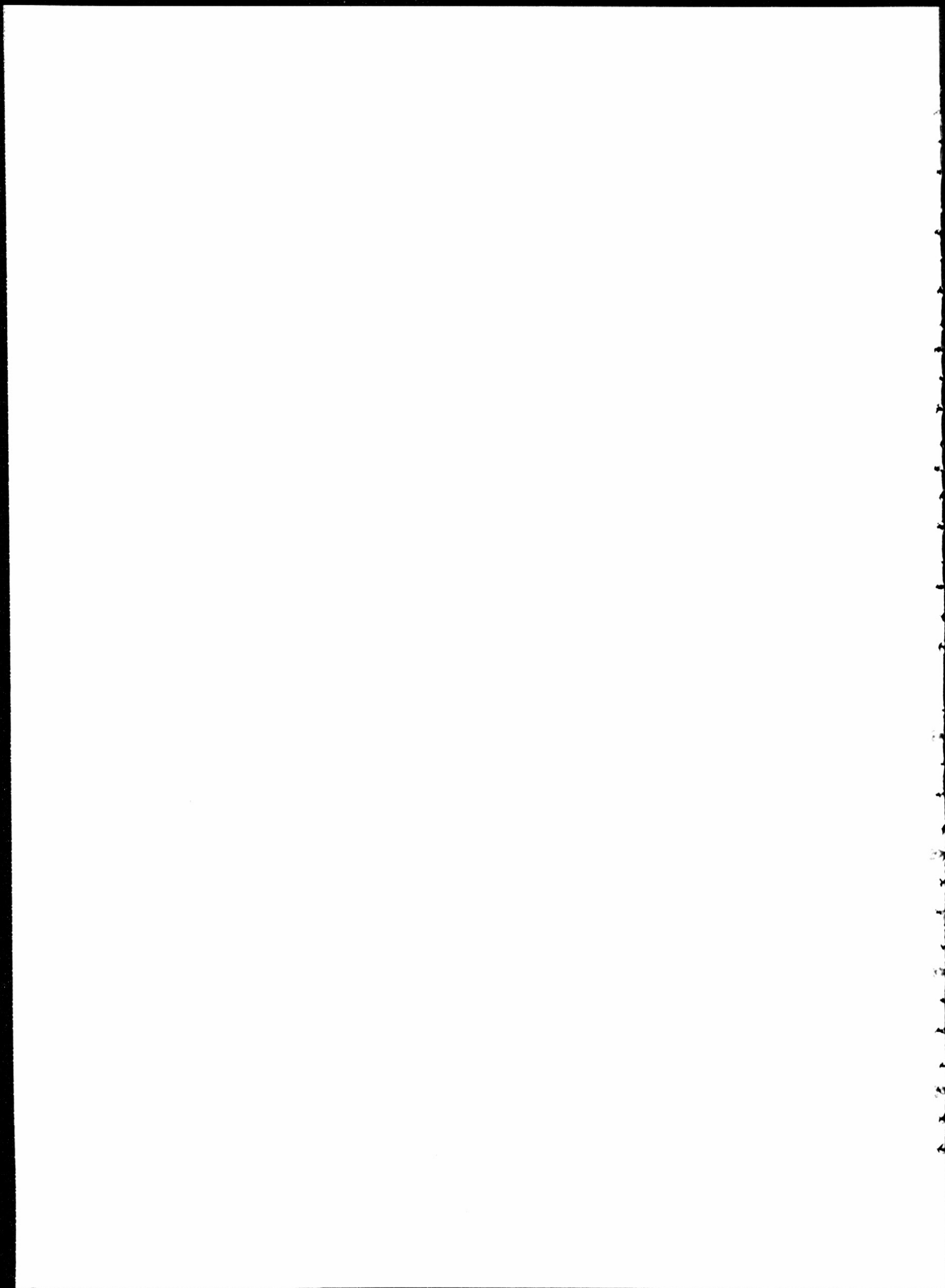
Joseph W. Stewart

CLERK

OPPOSITION TO
PETITION FOR REHEARING BY THE COURT
EN BANC¹

The appellants respectfully urge this Honorable Court to deny the petition for reconsideration by the full Court.

¹ It is noted that neither the Solicitor, Department of Labor, nor the United States Attorney, who represented the Deputy Commissioner on appeal, have joined in this request for rehearing.



ARGUMENT

In support of this position, the appellants observe that the unanimous decision of the panel of this Court:

did not "fail to apply and follow the standard of judicial review set forth by this Court and the Supreme Court,"

did not "improperly reject the reasoning and inferences of the Deputy Commissioner . . . and substituted its own,"

did not "speculate as to evidence contrary to that . . . in the record,"

and

did not "improperly" substitute its version of the facts.

Appellants agree that the findings of the Deputy Commissioner are generally to be considered binding, but an appellate court is not bound when the findings include error, are unsupported by the record as a whole, and in many basic respects, contrary to the law. (i.e. legal presumptions)

Appellants do not agree that this Court's action "represents a flagrant invasion of the fact finding function of an administrative body" that it "payed lip service to its limited function" but "proceeded to review the facts and then in total disregard of all of the facts on record proceeded to highlight only those facts which it considered favorable to the appellants' cause" nor that the Court "substitutes its own recollection of some unrelated steering difficulty with an automobile . . . for specific evidence in the record."

Without restating the record or repeating their brief, the appellants wish to point out that the Government's original brief on appeal admitted error in the finding of fact as to complaints by decedent that the work was too hard for him (P. 11); that the employer and carrier did not produce a single witness to testify, FROM HIS OWN EXPERIENCE, to the alleged ease of operating the "death" rig; (when they failed to produce the decedent's immediate successor, the appellants did, and this witness testified

to the extreme difficulty involved); that petitioners' sole evidence on this point was a motion picture taken 15 MONTHS AFTER THE DEATH and operated by a person neither known nor identified,² performing operations different from those involved at the time of death!

PETITIONERS' BASIC ERROR

Petitioners allege that there "is absolutely no evidence in the record . . . that the employee was engaged in any activity when he died." The record (Tr. 78-79) clearly relates through an eyewitness that decedent "was backing the truck crane into a difficult position and making a sharp turn at the same time," that the witness was standing behind the rig "motioning the rig to come back" when someone hollered that "Hank has passed out," that "the truck crane was rolling a little bit" and that Charlie Lemmons "jumped there and shut the ignition off inside the cab."

CONCLUSION

WHEREFORE, appellants respectfully request the Court to deny the petition for rehearing.

Respectfully submitted,

Martin E. Gerel

Lee C. Ashcraft

Joseph H. Koonz, Jr.

925 - 15th Street, N. W.
Washington 5, D. C.

Attorneys for Appellants

² This driver may well have been a much hardier, younger and healthier person than the decedent.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 8th day of August, 1962, to M. S. Mazzuchi, Esquire, 405 Investment Building, Washington 5, D. C., Attorney for Appellees, and U. S. Attorney, U. S. Court House, Washington, D. C.

Martin E. Gerel

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,582

MADGE VINSON, Surviving wife, et al.,

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vs.

CHARLES EINBINDER, Deputy Commissioner,
Bureau of Employees' Compensation, et al,

Appellees.

PETITION FOR REHEARING BY THE COURT EN BANC

The appellees, Aetna Casualty & Surety Co. and McCloskey Enterprises, Inc., petition this Honorable Court for a rehearing en banc of the above-entitled appeal for the reason that:

The Court in its decision failed to apply and follow the standard of judicial review set forth by this Court and the Supreme Court in previous decisions.

The Court improperly rejected the reasoning and inferences of the Deputy Commissioner as to evidence heard and seen by him and substituted its own.

The Court improperly speculated as to evidence contrary to that which appeared in the record and drew erroneous conclusions therefrom.

The Court improperly substituted its version of the facts in lieu of accepting the findings of facts of the Deputy Commissioner which findings of fact were based upon substantial evidence considering the record as a whole.

ARGUMENT

The action of the Court in this case represents a departure from the accepted standard of judicial review of the actions of administrative bodies and represents a preempting by this Court of the functions of an administrative body as established by Congress. The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. Sec. 901, et seq., as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600 D.C. Code 36-501, contains and sets forth the duties of the Deputy Commissioners with respect to claims filed under said Act. The Supreme Court in Crowell v. Benson, 285 U.S. 22, said in construing this act: ". . . there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the Deputy Commissioner, supported by evidence and within the scope of his authority shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

There have been many decisions of the Supreme Court since that time which have explained and interpreted the respective functions of the Deputy Commissioner and the reviewing Court in these cases. As stated by the Supreme Court in Del Vecchio vs. Bowers, reported at 296 U.S. 280: ". . . the issue must be resolved upon the whole body of

proof pro and con; and if it permits an inference either way . . ., the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court." "If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing Court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable." See Cardillo v. Liberty Mutual, 330 U.S. 469. This Court has even gone so far as to say that "The Deputy Commissioner is not required to disclose his reasoning process in reaching a conclusion . . ." See Vendemia v. Cristaldi, 221 F.2d 103. It is clear then that this Court is limited in its review in the instant case to a determination of whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole. See Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, and O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504.

It is respectfully submitted by the Appellees that the action of the Court in the instant case represents a flagrant invasion of the fact finding function of an administrative body. While it payed lip service to its limited function the Court proceeded to review the facts and then in total disregard of all of the facts on record it proceeded to highlight only those facts which it considered favorable to the appellants' cause. The Court even substitutes its own recollection of some unrelated steering difficulty with an automobile without power steering for specific evidence in the record concerning the amount of force required to steer the vehicle which plays an important part in this case. The employer produced moving pictures in the trial of this case in order to demonstrate the force required to steer this vehicle. These pictures are still avail-

able and if the Court deems it necessary they can be shown to the Court. The movies showing the operation of this vehicle and the testimony of George P. Diederick, Jr., a crane operator for 20 years, who testified among other things (T. 118) "that the rig drives more or less like a big truck, and does not require any extraordinary strength to operate" seems to have been completely ignored by the Court. Likewise this man's statement that he saw the employee from time to time operating said rig and never noticed him having any trouble driving it (T. 128) or that he saw the employee whom he knew very well driving the rig and he never complained about it being too hard to drive (T. 120, 128-129) as well as the testimony of Howard F. Massey, general superintendent of the employer, who had been in the construction business for 35 years and who was well acquainted with the type of vehicle under discussion, that the rig the employee had been driving was no more difficult to manage than any other manually steered truck (T. 141-144), or his comments regarding the rig in question while viewing the moving pictures showing the facility with which the rig could be steered, was with the same ease discarded by the Court in arriving at its conclusion concerning the facts. It is apparent that the Deputy Commissioner had ample evidence upon which to base his findings of fact. We are, of course, completely in the dark as to his reasoning process. We can only surmise that he did not feel that the testimony of the witnesses presented by the employee was totally worthy of belief. It was his province and his alone to determine which witnesses to believe and which not to believe. It may be significant that there is not one word of testimony to the effect that the employee complained to any other employee that the work of steering the vehicle in question was too difficult for him.

The Court seems to lay great stress upon the fact that the employee was "maneuvering and backing into a very tight and difficult spot" when he died. There is absolutely no evidence in the record of testimony taken before the Deputy Commissioner in this case that the employee was engaged in any activity when he died. The testimony is

that the employee was found dead in the cab of the rig while it was standing still. This is one of the essential weaknesses in the employee's case. There was no proof of injury. Judicial review of a rejection of a claim involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case there must be affirmative evidence in the record to support the award; in the former, affirmative evidence is not needed to support the denial of compensation because upon failure of a claimant to carry the burden of proof in support of his claim, it must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. The employer need not prove a negative. In the case of Gooding v. Willard, 209 F.2d 913, the Court said: " . . . the burden to show that the accident was a contributing cause of the death was on the appellee. . . . the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged."

The Court indicates in its opinion that the opinion of Dr. Walsh, a specialist in cardiology, was based upon erroneous facts. The fact of the matter is that Dr. Walsh had the benefit of all of the facts, including the review of all of the statements of the various employees who testified concerning the death of Mr. Vinson, a viewing of the motion pictures showing the operation of the rig which Mr. Vinson was operating, a review of the autopsy report, and previous testimony in the record indicating that Mr. Vinson was doing nothing unusual prior to his death (T. 163, 164, 165, 166 & 167). He concluded that unless it is shown that there was some unusual effort within approximately three minutes of death, one cannot relate the two events (T. 165), that Mr. Vinson had a pre-existing sclerotic heart disease; that no effort was necessary to precipitate the employee's death from coronary insufficiency which was secondary to sclerosis (T. 178) that there was "no relationship between the employee's work and his death" because the autopsy report showed no myocardial infarction, no fresh occlusion and no fresh thrombosis (T. 179-180), that similar findings as here are made every day in

autopsy reports in every large city with respect to persons who fall over dead while they are walking down the street, sitting and talking or while in bed (T. 180-181).

CONCLUSION

In view of the above it is respectfully submitted that the Court erred in reversing the judgment of the Court below and that this matter should be heard by this Court sitting en banc in order to settle the question of the scope of judicial review of the decisions of administrative bodies.

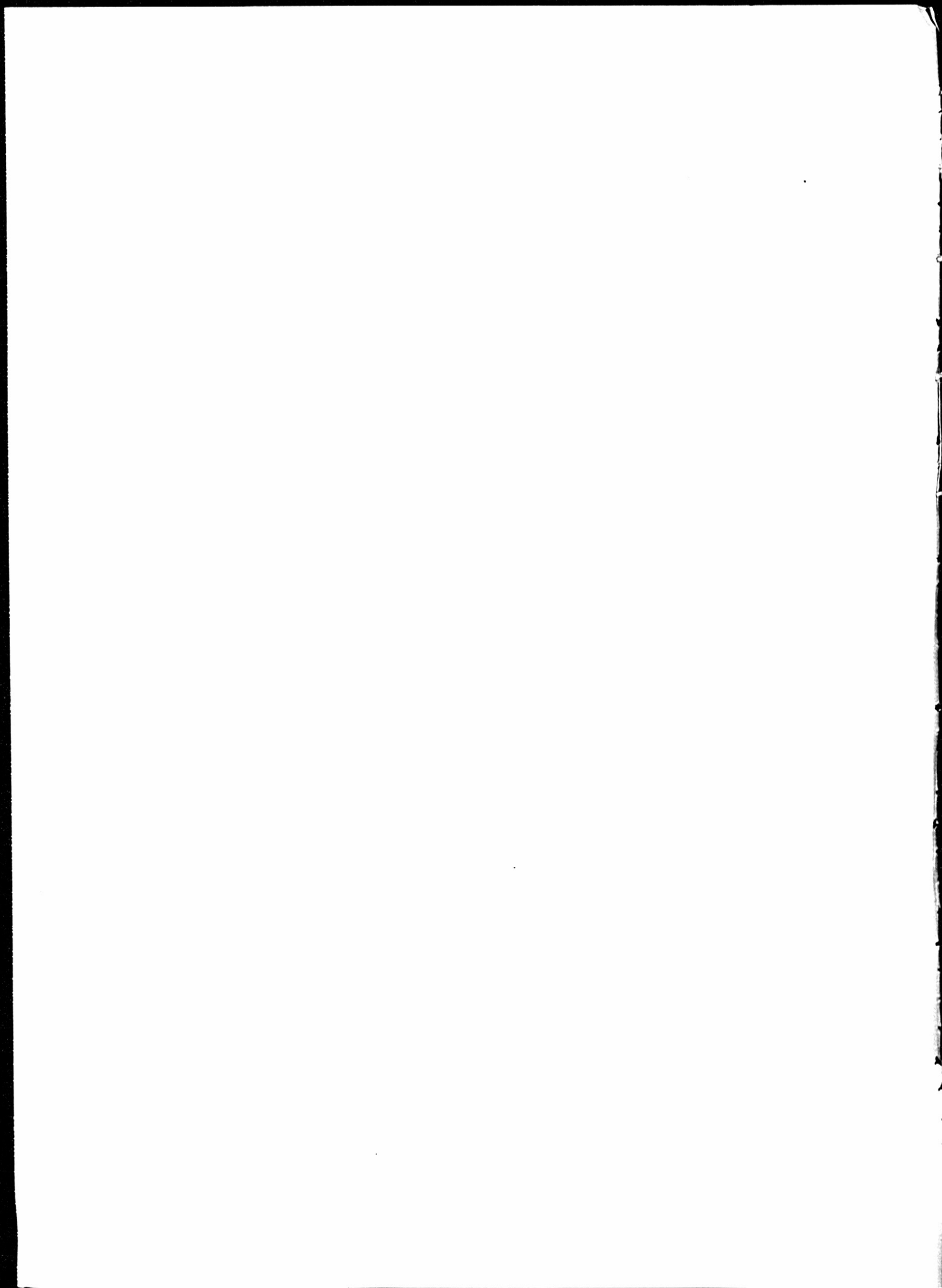
Respectfully submitted,

M. S. Mazzuchi
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing by the Court en banc was mailed, postage prepaid, this 27th day of July, 1962, to Martin Gerel, Esq., Attorney for Appellants, 925 - 15th Street, N. W., Washington, D. C., and U. S. Attorney, U. S. Court House, Washington, D. C.

M. S. Mazzuchi



CERTIFICATE OF GOOD FAITH

I, the undersigned attorney for the Appellees, Aetna Casualty & Surety Co. and McCloskey Enterprises, Inc., herein, do hereby certify that in my opinion the grounds set forth in the motion for a rehearing are substantial, and the motion filed in good faith, and not for the purpose of delay.

M. S. Mazzuchi